

**METROPOLITAN SUNDAY
NEWSPAPERS, INC.**

260 MADISON AVENUE
NEW YORK, N. Y. 10016
(212) 689-8200

11/3/72

Dear Sir,

Enclosed is textblock of our
feature on Max Ehrmann, sent
to you at the request of
Mr. Cavinder.

Sincerely,

Virginia Gaudette

VIRGINIA GAUDETTE
ASSISTANT EDITOR

SUNDAY GROUP FEATURE

FOR RELEASE: December 10, 1972 or thereafter

Max Ehrmann, Who Yearned to be a Famous Writer, Finally Gained Renown Posthumously When His Work "Desiderata" Was Mistakenly Identified as an Ancient Classic...

AMERICA'S CHRISTMAS CARD PHILOSOPHER

by

Fred D. Cavinder, *Editor, Indianapolis
Star Sunday magazine*

At this moment, somewhere in America, some person or firm is probably getting ready to use "Desiderata" on a Christmas or New Year's greeting in the mistaken belief that it was found on the wall of a Baltimore church in the 17th century. But "Desiderata" is not ancient, despite the universality of its sentiment. It dates to 1927 when Max Ehrmann, poet, author, philosopher, lecturer and attorney, composed it as a formula for "how to live with dignity with one's self and with others in a world of turmoil."

Dapper Max, with his ever-present walking stick as his sartorial trademark, was the resident poet of Terre Haute, Indiana. While he was

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alive, his hometown gave him scant recognition. He was probably 50 years ahead of his times, and in his 73 years he became resigned to the frustration of not being able to make a living from writing. Yet he once said somewhat defiantly, "I would rather write one beautiful thing that might abide amid the perpetual flux, even though I lived and died poor, than to be the author of 40 commercial novels." That is just about what happened.

"Desiderata," which means things wanted and needed, outlines the ingredients of a peaceful, fertile life as Ehrmann saw it, and urges, "Be cheerful. Strive to be happy." (It was the "Smile, God loves you" of 1927.) "It counsels those virtues I felt myself most in need of," Ehrmann explained. "To travel on serenely, doing one's duty, and responding honestly to each day's problems in the right attitude."

Today, the rights to "Desiderata" and other Ehrmann works are owned by Robert L. Bell of Boston, a publisher who has been called a "dapper Irishman." In 1971, Bell bought the rights to the poems, which had passed from Ehrmann's widow, Bertha Pratt King Ehrmann (they were wed only three months before he died), to her nephew, Richmond G. Wight of Brookline, Mass. When Bell came on the scene, "Desiderata" was just beginning to get popular. Yet in his brief period of ownership, Bell has had more than his share of headaches in affirming his copyright. The problem is that a large segment of the public feels "Desiderata" belongs to the ages.

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In the late 50's, the Reverend Frederick Ward Kates, rector of Saint Paul's Church in Baltimore, quoted "Desiderata" in a booklet. He gave proper credit to Ehrmann, but the minister's practice of distributing mimeographed messages to his congregation later produced the confusion. These sheets carried the notation, "Saint Paul's Church, Baltimore, 1692," which was the year the church was founded. As these sheets containing "Desiderata" were passed about, the myth was spread that the work was found 300 years ago on a gravestone or a plaque. The myth's acceptance caused the headaches for the Ehrmann legacy.

Countless magazines, including Good Housekeeping and Reader's Digest, and church and company publications contributed to the false notion. Only this year, Ann Landers told her readers that "Desiderata" came from the Baltimore church. Adlai E. Stevenson was preparing to use the poem on his Christmas cards at the time of his death in 1965.

"I traced one bunch of hippies to Taos, New Mexico, where they were printing 'Desiderata' in a cave," recalls Bell. Only this year, right in Bell's hometown, an insurance company mis-attributed the poem. "Some people get downright nasty. How dare we copyright something found in a church in 1692, they demand," says Bell.

Fred Werner and Les Crane at first believed the old church myth when they set "Desiderata" to music in 1971. The recording was an instant success, reaching the top 10, where it remained for months. Werner discovered the mistake, however, called Bell to clear the

copyright, and "Desiderata" got legit in time to win the 1972 Grammy Award as the "best spoken word recording."

Max Ehrmann, who was born September 26, 1872, never would have believed it. "Ehrmann was a hippie for his time," says Bell. "Ehrmann is a guru to the younger generation."

One critic observed recently, "Ehrmann's writings on war are so exactly what the young people feel now, it's mystifying why the public took so long to discover him." Posters of Ehrmann's poems have been issued on love and happiness.

Not long ago, Bell reissued "Prayer," the only Ehrmann poem to get national acclaim while he was alive. It was written during an evening of despair, illness and loneliness in Columbia, S.C., when music from a nearby dance reached his hotel room to increase his melancholia. Ehrmann tossed it in a wastebasket, but a friend retrieved it.

In 1908, a Chicago judge gave a copy of "Prayer" to everyone convicted in his court. In 1909, "Prayer" was read on the floor of Congress and placed in the Congressional Record. And in 1904, when "Prayer" hung on display at the St. Louis World's Fair, it was stolen, creating national headlines.

One night at DePauw University, Ehrmann made a boyish pledge to the stars to devote his life to writing beautiful things. He studied law and philosophy at Harvard for two years. Returning to Terre Haute,

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he became a deputy states attorney for two years, and then joined his brothers in an overalls factory. For ten years he was the firm's lawyer and credit manager.

But his real work came at night in his room where he wrote, rewrote and then sometimes set his words aside for aging before reworking them again. He became a familiar, though sometimes misunderstood, figure around Terre Haute. He would occupy a bench in the park for hours. He took frequent walks, rode horseback, lunched with professors at Indiana State Teachers College, played golf and used an archery range which at one time was named after him. In the three rooms where he spent most of his life, he invariably wore a dressing gown.

Among his contemporaries were the famous brothers Paul Dresser and Theodore Dreiser. Ehrmann admired both, lauding Dreiser for realism in writing, although noting, "His special fault is lack of taste." For a time Ehrmann vigorously supported Eugene V. Debs, the early American socialist. Yet Debs alienated the poet when he exhorted the workers to commit violence.

Even though Ehrmann recognized the shortcomings of his hometown, he never left. "Here in this smoky, commercial city that has not one bit of bronze or marble for the public eye--yes, even here let me keep my eyes open, my feelings warm, my understanding keen," he wrote.

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Bewilderment may have contributed to keeping him home. He railed against the crass commercialism of the youth of that time, their St. Vitus dance approach to life. Once while visiting New York, Ehrmann stopped in a bookstore and later wrote how the large number of volumes flabbergasted him. He worried how, from such a great literary flotsam and jetsam, anybody would choose his writings to read.

In 1911, Max wrote a play called "The Wife of Marobius." Set in ancient Rome, it was an early women's lib drama, recounting the plight of Clodia, a wife who tried to murder her husband after realizing he thought nothing of her mind and soul and regarded her only as a sex object. By 1917, however, the play was still unproduced, a fact lamented upon by Drama Magazine at the time.

Ehrmann wrote other plays, one called "The Bank Robbery" which was widely staged. While attending Harvard, he wrote sketches for the Boston Herald, as well as some fiction. Yet he looked back on these early efforts with disdain, and later on turned to poetry and poetic narrative.

Once he wrote a poem lamenting that in order to live his life he had to pretend to the world that he was getting wealthy with his pen. In reality, Ehrmann's family was well-to-do, not only in the overalls business, but one brother, Charles, made fortunes in coal, meat packing and real estate. Charles' money had put Max through school.

Ehrmann had some success lecturing and is remembered by numerous people for the encouragement he gave them in continuing with their writing.

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Although Ehrmann produced 22 books and pamphlets and his works appeared in 33 languages and dialects, it took nearly 100 years for him to earn the accolades he longed for. These he got mainly because of a single work, "Desiderata." About eight years ago, publisher Bell's firm got rid of all the old Ehrmann books they had on hand. "They just weren't moving," said Bell. As a result, the only thing which remains in print is "The Poems of Max Ehrmann."

"May I not be ungrateful for the small public that reads and loves my writings," Ehrmann wrote in 1918, in the midst of his years of futility. "As time goes on, the number may increase. Perhaps even when I am dead, some browser in libraries will come upon me and, seeing that I was not altogether unworthy, will resurrect me from the dust of things forgotten."

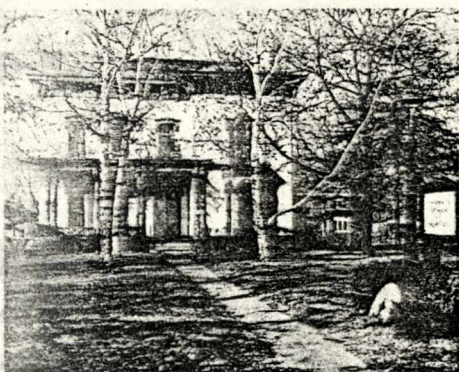
Little did Max Ehrmann anticipate that he would someday be given a shortcut to fame--albeit a belated one--through a mistake of authorship on hundreds of Christmas cards.

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SIGHTS TO SEE

Are you turned off by anything labeled "Historical?" Do you shun "museums?"

If so, an excitingly new experience awaits you at the Historical Museum of the Wabash Valley.



Located at 1411 South Sixth Street, on the southwest corner of Sixth and Washington, the Historical Museum is itself a landmark. A large brick structure in the Italianate style, it was built as a residence in 1868. Directly across Washington Street is the home of Anton J. "Tony" Hulman, owner of the famed Indianapolis 500 Motor Speedway.

As you tour the Museum, you will sense an immediacy with the past as each artifact* brings you face to face with both the ordinary and the great men and women who traveled these same streets and roadways before you. It is this awareness that restores to the visitor a feeling-of belonging to a continuing society.

The Museum houses more than 30,000 items that are historically significant to the settlement and growth of Terre Haute and the Wabash Valley area.

Pictures, relics, documents, maps, statuary, diaries, bills of lading — all relate the lives and experiences of those who were here before us. Many of the items have a special significance because they were associated with such famous Terre Hauteans as Eugene Debs, Paul Dresser, Theodore Dreiser, and Max Ehrmann.

Did you ever see phonograph records that were made of metal? The Regina-phon uses them. It is spring-operated, built around 1890, and is one of the most popular items for visitors of all ages. You may select any of the songs in the record collection and it will be played for you.

"Every visitor finds here some kinship with the past," says Mrs. Dorothy J. Clark, Curator. "Our role is to stimulate

(Continued on page 5)

SIGHTS TO SEE

(Continued from page 4)

rather than teach facts, and to reveal rather than preach."

A large carved figure named "Punch" is another favorite. Created by a wood-carver in New York for Biel's Tobacco Store, it arrived in Terre Haute in 1867 and was an attraction at the store for many years. "Punch" was made from the butt end of a mast from an old sailing ship.

A piano used by Paul Dresser is also on the main floor. It is believed that Dresser, who composed Indiana's state song "On the Banks of the Wabash," was at this piano when he wrote "My Gal Sal."

In one of the twelve display rooms is a grandfather clock that stood in the first statehouse at Springfield, Illinois. Abe Lincoln used this clock to check his own watch while he was practicing law there.

One can visit an old-time store in the basement, or a bedroom of the 1850's on the second floor.

Of particular interest now is the Max Ehrmann collection of pictures, poems, letters, posters, books and pamphlets. Ehrmann, author of the world famous

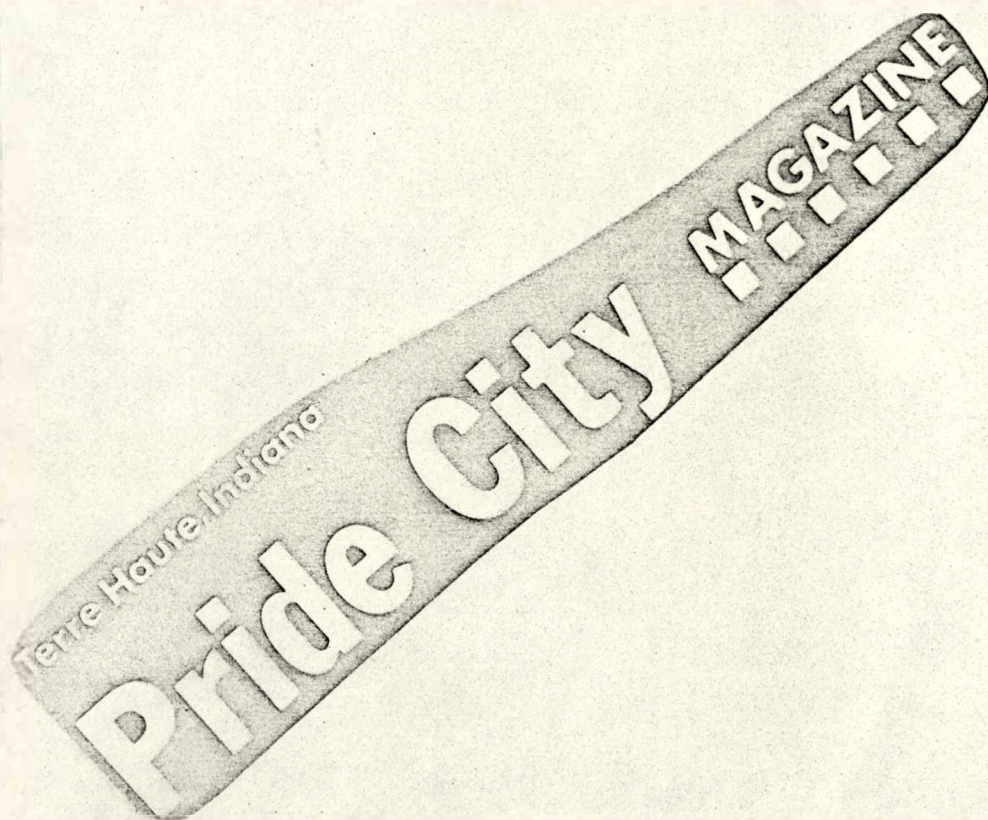
"Desiderata" and "A Prayer," lived his lifetime in Terre Haute. An Ehrmann Centennial will be held here during September, 1972, the 100th anniversary of his birth.

The Historical Museum is open 1:00 to 4:00 p.m. Sunday through Friday. Guided group tours can be arranged anytime by calling Mrs. Clark at 235-9717 or 232-8705. Tourists and out-of-town visitors will receive a warm welcome, and there is no charge for admission.

— Edward N. Howard, Director
Vigo County Public Library



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*Artifact — any object made and used by man.

DESIDERATA

GO PLACIDLY amid the noise and the haste, and remember what peace there may be in silence. As far as possible, without surrender, be on good terms with all persons. Speak your truth quietly and clearly; and listen to others, even to the dull and the ignorant; they too have their story. Avoid loud and aggressive persons; they are vexatious to the spirit. If you compare yourself with others, you may become bitter or vain, for always there will be greater and lesser persons than yourself. Enjoy your achievements as well as your plans. Keep interested in your own career, however humble; it is a real possession in the changing fortunes of time. Exercise caution in your business affairs, for the world is full of trickery. But let this not blind you to what virtue there is; many persons strive for high ideals, and everywhere life is full of heroism. Be yourself. Especially do not feign affection. Neither be cynical about love; for in the face of all aridity and disenchantment, it is as perennial as the grass. Take kindly the counsel of the years, gracefully surrendering the things of youth. Nurture strength of spirit to shield you in sudden misfortune. But do not distress yourself with dark imaginings. Many fears are born of fatigue and loneliness. Beyond a wholesome discipline, be gentle with yourself. You are a child of the universe no less than the trees and the stars; you have a right to be here. And whether or not it is clear to you, no doubt the universe is unfolding as it should. Therefore be at peace with God, whatever you conceive Him to be. And whatever your labors and aspirations, in the noisy confusion of life, keep peace in your soul. With all its sham, drudgery and broken dreams, it is still a beautiful world. Be cheerful. Strive to be happy.

Max Ehrmann

Terre Haute, Ind.

Dec. 6, '40

Ruth Bloch,
640 East Washington Ave.,
New York City.

Dear Miss Bloch:

I thank you for your letter of Nov. 29. I am glad you like "Desiderata." I wrote it for myself - something to live by. I carried it in my pocket for many months, to see if it would "work" on the street as well as in the protections of my study. It underwent many changes.

You suggest that a booklet be made of it. Do you know a publisher who might be interested in such an enterprise?

I am sending you five autographed copies. You may wish to give them away for Christmas.

Best wishes

May Starnes

REFERENCE
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VIGO COUNTY PUBLIC LIBRARY
TERRE HAUTE, INDIANA

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Vigo County Public Library

Ehrmann, Max

Community Affairs File

September 23, 1972

THE MYTH OF DESIDERATA

Before discussing DESIDERATA, I want to publicly thank the people of Terre Haute for their hospitality to me and more specifically the Chamber of Commerce and the Public Library for their efficiency. Certainly it can not be claimed here that the Library people are somewhere down behind the books, rather they are out participating in civic affairs. Also, since our primary business is in music textbooks, I have enjoyed the choral groups immensely.

Give background of TOGETHER magazine story (attached). How St. Paul's Church, 1692 was printed on all of their literature to pinpoint place, not origin. DESIDERATA was good and caught on. That, in general, is the substance of the myth of DESIDERATA being found in an old graveyard or plaque (take your choice) dated 1692. But those of you who know words will recognize that some of the words in DESIDERATA were not known in 1692, for example, there was no such word as "career." Max Ehrmann is the sole author, and something which I will read a little later will show the continuity of his thought. Perhaps people hear or believe what they want to hear, and in our time, the era of revolutionary change, it would be comforting to feel that the people of 1692 - supposedly a gentler age - had the answer. But bear in mind that those born since World War II think that 1927 was an ancient age.

However, the thing that set DESIDERATA on the road to great popularity was a mistake by a news columnist. Aub. Adlai Stevenson

had a guest house in Geneva, Switzerland. Newspaper people could use it while passing through. Betty Beale of the Hall Syndicate noticed typewritten copy by his table indicating he was going to use DESIDERATA on his Christmas cards. She copied it in shorthand, and when Stevenson passed away, wrote a national column giving DESIDERATA in full and credited St. Paul's Church. Senator Eugene McCarthy's office, checking on it for use by the Senator, found that we had copyright and called us. Mrs. Beale retracted the story but that set things in motion for all the infringements that have taken place. Of some interest to you is that DESIDERATA is still on the top ten record charts in England, after having been in the top ten in the United States last fall. It is expected to revive this fall and during every holiday season.

It has now sold over 1,000,000 records. It is in French, Canadian, Spanish and German. It has been read by Bing Crosby on his show, ^{Vincent} Victor Price on the Carol Burnett Show, Joan Crawford on the Merv Griffin Show, Ali McGraw on the Ed Sullivan Show, Hugh Downs on the Today Show and many more, sometimes with proper copyright being given, sometimes not. It has also appeared in "Good Housekeeping" magazine, "Readers' Digest," "Mary Worth" comic strip, "Success Unlimited," and is reproduced under license on posters, linens, plaques, banners, greeting cards, for company use at holidays and is licensed abroad for such uses in England, Australia and New Zealand. Many of you may be aware that the "Ann Landers" column recently reprinted DESIDERATA giving credit to St. Paul's Church, and I can tell you that within the next two months a retraction is due to appear with proper credit to be given.

In looking through old files, I found that Mrs. Ehrmann gave a list of the people from whom she had received letters in her lifetime praising DESIDERATA. Among these people were Gregory Peck, Frederick March, Mark VanDoren, H.V. Kaltenborn, Dorothy Canfield Fisher, Norman Thomas, Elmer Davis, all once famous names of the past, but perhaps only Gregory Peck is still known to the now generation.

It has been a most enjoyable experience for me to get behind the printed page and get to know Max Ehrmann as a person, as well as the wonderful people I have met all over the world. I has also given me the excuse to go to Harvard Square periodically, not only to look up his record, but also to sample the wonderful German beer at the Wursthause.

I spoke a little earlier about some further "proof" that Max Ehrmann wrote DESIDERATA, and in closing, would like to read something to you, upon which he apparently based DESIDERATA.

This was on his desk for years, and as you listen to it, you will agree that many of the same thoughts expressed there were more fully expressed later in DESIDERATA. It also has a deep meaning for me, and helped me more than I can tell when five years ago, at the age of 40, I had to start all over, after a bitter corporate fight:

"Keep interested in your own career. See in the future some progress, however little. Maintain the respect of them that meet you day by day through sincerity, not servility. Condemn conditions rather than men. Believe and say some good of life. And though you lash injustice with bitter words, be still sweet at heart. Know that to begin cheerfully again when you have failed is itself a great success."

ans 7/3
referred to Vigo Co. Hist Soc.

Sullivan, Ind-R.I.
June 22 - 1967

Fairbanks Memorial Library
Terre Haute - Indiana.

Dear Friends:

Could you inform
me where I might obtain copies
of the inspiring and immortal classic
entitled - Peace In Silence -
This gem of literature was found
an old copy in Old Saint Paul's
Church, Baltimore, Md., dated 1692.
Some years ago, the late Max
Ehrmann quoted this literary classic
in his column, in Terre Haute Star.
It was assumed Ehrmann was author
of same, as he often quoted it in his
famous lectures. The truth is, the
author of Peace In Silence is not
known. What I seek is, Peace In
Silence, printed as a single sheet
leaflet, size 6 inches wide and about
8 inches long, paper of the leaflet is
cream tint, and is firm vellum paper.
Thank you.
Mabel Brewer

Chrmann, Max

6/26/74

Public Library
Terre Haute, Ind

Gentlemen: I was very interested in the celebration of the birth of Max Erismann, Terre Haute's poet, when it took place a couple of years ago. I've been unable to find any of his works in our local library. At the time when I listened to TV programs there were some publications offered.

Do you still have some. I would appreciate receiving them. I would especially like to get a copy of "You Are a Child of the Universe."

Thank you.

Agnes Skidmore

Mrs. Glen

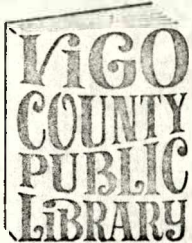
RR3.
Robinson, Ill. 62454

Community Affairs File

Viigo County Public Library

REFERENCE
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July 3, 1974



Dear Mrs. Skidmore,

I am enclosing a xeroxed copy of the "Desiderata" which is the title of the poem you spoke of in your letter.

I am also enclosing the Vigo County Public Library pamphlet on Max Ehrmann. This pamphlet, incidentally, includes another of his poems, "A Prayer"; Which I am sure you will enjoy.

Thank you for your interest.

Carmen Gordon

Carmen Gordon

Reference Librarian

CG/kp

OCT 3 1973

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ROBERT L. BELL
dba Crescendo Publishers,
et al.,

Plaintiffs

v.

PRO ARTS, INC., et al.,

Defendants

NO. C 71-661

MEMORANDUM OPINION
AND ORDER

Battisti, C.J.

This is an action seeking injunctive relief and damages pursuant to 17 USC §101 for alleged copyright infringements. The case came on for trial before this Court on August 13, 1973, jury having been waived by the parties. In accordance with Rule 52(a), F.R.Civ.P., the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. The Parties

1. Plaintiff Bell, dba Crescendo Publishers, is a citizen of Massachusetts, having his principal place of business in the City of Boston. He is engaged in the business of book publishing.

2. Plaintiff Cuarta Corporation, dba Crescendo Publishing Company, is a Massachusetts corporation, having its principal place of business in the City of Boston. It is engaged in the business of publishing music, text and trade books, and literary works.

3. Defendant Pro Arts, Inc. (hereinafter Pro Arts) is an Ohio corporation, incorporated in 1969, and originally having its principal place of business in Kent, Ohio. Pro Arts is now situated in Medina, Ohio. Defendants estimated the gross revenues of Pro Arts to have been \$350,000. in 1969; \$550,000. in 1970; \$700,000. in 1971; \$1,000,000. in 1972; and \$1,200,000. in 1973. In 1973, approximately half of the gross revenues of Pro Arts resulted from the sale or exchange of approximately 1,500,000 posters.

4. Defendants Michael P. Trikilis (hereinafter M. Trikilis) and Theodore N. Trikilis (hereinafter T. Trikilis) are, respectively, the president and vice-president of Pro Arts, each owning forty percent of the stock of the corporation. M. Trikilis has been, and is, generally in charge of productions and operations; and T. Trikilis has been, and is, generally in charge of sales and new product development.

B. DESIDERATA

5. DESIDERATA is a prose poem, the full text of which, as published by plaintiff Cuarta Corporation, with distinctive printing and spacing figures and bearing copyright notice, "© 1927 Max Ehrmann, © Renewed 1954, Bertha Ehrmann, Crescendo Publishing Company, Boston 02116," is plaintiffs' Exhibit 1. DESIDERATA was written by Max Ehrmann. It was first published by Mr. Ehrmann, dba Indiana Publishing Company, on January 3, 1927, in Terre Haute, Indiana, and was first copyrighted January 6, 1927, under copyright registration #A962402 (PX-2A and PX-26). This copyright was renewed February 25, 1954, by Bertha K. Ehrmann, widow of Max Ehrmann, under renewal registration #R 127188 (PX-2B, PX-27). Later DESIDERATA was included in a book entitled, Poems of Max Ehrmann, published November 22, 1948, by Bruce Humphries,

Inc., of Boston under a contract and assignment dated March 4, 1948 (PX-3A) by and from Bertha K. Ehrmann, with and to Bruce Humphries, Inc., under copyright registration #A28266, as obtained December 13, 1948, by Bertha K. Ehrmann for her assignee, Bruce Humphries, Inc. (PX-3B, PX-28).

6. There is a myth that DESIDERATA was "Found in Old Saint Paul's Church, Dated 1692." This myth has no basis in fact whatsoever (PX-3G).

C. Plaintiffs' Claim of Title to DESIDERATA copyrights¹

7. The claim of title as to the copyrighted book, The Poems of Max Ehrmann (containing the work DESIDERATA) began with a March 4, 1948, agreement between Bertha K. Ehrmann and Bruce Humphries, Inc. (PX-3A). In this agreement, Bertha K. Ehrmann, as author, granted and assigned to Bruce Humphries Inc. ". . . a work entitled The Poems of Max Ehrmann with all rights thereto pertaining, whether in whole or in part, with exclusive right and power, as attorney, in the name of the author, to take out copyright thereof, and any and every renewal of copyright thereof, and to hold and enjoy said copyright and renewal, and publish said work, in whole or in part, during the term or terms thereof, in all countries and in all languages." Bruce Humphries, Inc., also obtained the right to sell subsidiary publishing rights to the book.

8. On November 22, 1948, a book entitled The Poems of Max Ehrmann (containing DESIDERATA) was published by Bruce Humphries, Inc. On December 13, 1948, copyright registration for that book, #A28266 (PX-3B, PX-28) was issued by the Copyright Office in the name of Bertha K. Ehrmann, with the

1) In an effort to expedite the trial of this case, and because defendants failed to cooperate in connection with discovery pertaining to plaintiffs' claim of title to the copyrights in question, the Court permitted plaintiffs' counsel to submit, along with his proposed findings of fact and conclusions of law, and prior to decision by this Court, any and all documentary evidence relating to the claim of title. Counsel were instructed to agree on the authenticity of any such submitted documents unless a valid objection existed. There being no valid objection made to the documents plaintiffs offer for introduction into evidence (PX 26, 27, 28, 29), the documents are received.

certificate being sent to her assignee, Bruce Humphries, Inc., in Boston.

9. Thereafter, on May 9, 1960, Bruce Humphries, Inc., was purchased by Reliance Corporation and was operated as Bruce Humphries-Division of Reliance Corporation (PX-3C). On October 24, 1967, R. R. Larsen and Co., Inc., later purchased at a lien sale all assets of Bruce Humphries-Division of Reliance Corporation, consisting of the ". . . name, trade-name, goodwill, accounts receivable, copyrights, inventory office equipment, printing plates and customer lists. . ." of Bruce Humphries-Division of Reliance Corporation, then being operated personally by plaintiff Bell as president (PX-3D).

10. On September 30, 1968, plaintiff Bell purchased from R. R. Larsen and Co., Inc., dba Bruce Humphries Publishers, all rights previously acquired by Bruce Humphries Publishers with respect to "The Poems of Max Ehrmann by Max Ehrmann" and other literary works (PX-3E).

11. Thereafter, on January 16, 1962, Bertha K. Ehrmann died in Terre Haute, Indiana. Her will (PX-29) was admitted to probate in Vigo (County, Indiana) Circuit Court under Estate #24188. By this will, Bertha K. Ehrmann left her entire net estate to her nephew, Richmond Wight. Her net estate consisted of specified personal property, literary rights relative to the writings of her late husband Max Ehrmann, and a trust established for the sole benefit of her same nephew, Richmond Wight, after payment of debts and expenses.

The provision as to the bequest of Bertha K. Ehrmann to her nephew, of rights to the writings of Max Ehrmann, appears in Item III of her will:

"ITEM III-

" * * *

"I further bequeath to my nephew, Richmond Wight, all my right, title and interest in and to all royalties and income from the writings, poems and plays of Max Ehrmann, including royalties from individual plays."

12. Thereafter, on May 14, 1971, Richmond Wight, nephew of Bertha K. Ehrmann, deceased, made two assignments to plaintiff Bell (PX-2C and PX-3F).

13. On May 14, 1971, with respect to the single literary work, DESIDERATA, Richmond Wight, in plaintiffs' Exhibit 2C, after reciting the facts previously found herein in Findings 5 and 11, assigned to plaintiff Bell:

"... all of Assignor's [Richmond Wight's] right, title and interest in and to Poem [DESIDERATA] and the copyright and renewal copyright covering Poem [DESIDERATA] and all other rights pursuant thereto, such as Assignor [Richmond Wight] may possess." (PX-2C)

This assignment was recorded in the Copyright Office June 23, 1971, Volume 1419, pp. 219-220.

14. Also on May 14, 1971, with respect to the book of collected poetry written by Max Ehrmann, entitled The Poems of Max Ehrmann and including therein DESIDERATA, Richmond Wight, after reciting the facts previously found herein in Findings 9 and 11, assigned to plaintiff Bell:

"... all of Assignor's [Richmond Wight's] right, title and interest in and to Book [The Poems of Max Ehrmann] and the copyright, copyright registration and right to renew the copyright registration covering Book [The Poems of Max Ehrmann] and all other rights pursuant thereto such as Assignor [Richmond Wight] may possess." (PX-3F)

This assignment was recorded in the Copyright Office June 23, 1971, Volume 1419, pp. 217-218.

15. On February 1, 1972, plaintiff Bell assigned to plaintiff Cuarta all of Bell's publishing rights to the book entitled The Poems of Max Ehrmann (including DESIDERATA) under copyright registration #A28266 (PX-3B) and under an assignment to plaintiff Bell, of residual publishing rights to that book from Richmond Wight as found in Finding 14 above. This assignment from plaintiff Bell to plaintiff Cuarta was recorded in the Copyright Office April 17, 1972, Volume 1446, pp. 213-215 (PX-4)..

D. Pro Arts Utilization of DESIDERATA, Without Notice of Copyright, Before and After Written Notice to Cease and Desist

16. Plaintiffs' Exhibit 6 is a full-size black and white poster bearing the caption DESIDERATA in large type. It depicts a placid beach or water scene. On the bottom portion of that poster the full text of DESIDERATA is printed in distinctive type with the first three lines in full capitals and with distinctive spacing figures inserted between certain sentences, with two such spacing figures inserted at the end of the text, in the same manner and way as appear on copies of DESIDERATA as legally published by Crescendo Publishing Company (PX-1). Exhibit PX-6 bears no notice of copyright with respect to the DESIDERATA portion thereof. It does bear the unexplained notation "© 1968 AMERICAN NEWS-REPEAT CO., 243 Collins St., San Francisco, Calif. 94118." Upon inquiry directed to that address January 7, 1969, plaintiff Bell was informed as of January 28, 1969, that American Newsrepeat Company had gone out of existence in May 1968 (PX-8 and PX-9). Plaintiff Bell was thereafter unable to trace American Newsrepeat Company.

17. The Pro Arts 1970 catalog (PX-21), as distributed by Pro Arts to customers and prospective customers requesting same, included code numbered pictures of approximately 175 different poster designs, including No. OC37 DESIDERATA and No. OC38 DESIDERATA (picture). An undated Pro Arts advertising flyer (PX-20), utilized by Pro Arts in unknown quantities and during unknown periods of time, depicts, for sale, five selected color litho posters and eight selected black and white posters, included No. OC37 DESIDERATA. Each of the No. OC37 DESIDERATA items depicted in PX-20 and PX-21 at the bottom of the poster contains the words, "Found in Old Saint Paul's Church; Dated 1692." The No. OC38 DESIDERATA (picture), depicted in the 1970 Pro Arts catalog, shows no bottom margin and thus shows no space wherein a notice of copyright could be inserted. No copyright notice of any kind appears in either the 1970 Pro Arts catalog or in the undated Pro Arts advertising flyer with respect to any of the DESIDERATA items depicted for sale therein.

18. With respect to item No. OC38 [DESIDERATA (picture)], as offered for sale in the 1970 Pro Arts catalog, the Court has noted the identity of the placid beach or water scene and text of DESIDERATA there depicted, with the placid beach or water scene and text of DESIDERATA depicted in PX-6 (See Finding 17). The Court has also noted that Pro Arts, in its depictions of DESIDERATA, in both the Pro Arts 1970 catalog (PX-21) and in the Pro Arts advertising flyer (PX-20) has used a type face; a technique of capitalizing portions of the text of DESIDERATA; and an arrangement of spacing figures, which are identical with those used by plaintiffs in their

publication of their copyrighted representation of DESIDERATA (PX-1).

19. During the Boston Gift Show, held September 20-24, 1970, plaintiff Bell noted that a poster containing the full text of DESIDERATA and a pictorial representation of a placid beach or water scene (similar both to the placid beach or water scene with the full text of DESIDERATA included, shown in PX-6 and in Pro Arts 1970 catalog item No. OC38) was being displayed and offered for sale in Room 206 of that show. The program for the 1970 Boston Gift Show listed Pro Arts, Inc., P. O. Box 287, Kent, Ohio 44240, telephone (216) 296-4922, as the exhibitor in Room 206. Plaintiff Bell talked to the person in charge of Room 206, one Joseph Malone, advised Malone of Bell's ownership of copyright rights regarding DESIDERATA and demanded that the poster containing the placid beach or water scene and the full text of DESIDERATA be removed. It was removed. Upon inquiry, Malone informed Bell that the president of Pro Arts was Mike Trikilis. Bell made contemporaneous hand-written notes regarding this information and the Kent and Medina addresses of Pro Arts on page 238 of the 1970 Boston Gift Show Program (PX-5).

20. On September 25, 1970, Bell forwarded by certified mail #364126, return receipt requested, a letter addressed to Pro Arts Company, Box 287, Kent, Ohio 44240, referring to his conversation with Joseph Malone at the Boston Gift Show and demanding that Pro Arts ". . . cease and desist all sales of DESIDERATA in any form whatsoever. . . ." not bearing a proper copy right notice. Bell also demanded:

"In addition, you are to furnish us with the names and addresses of all manufacturers from whom you have purchased DESIDERATA together with the number of posters purchased and the list price from the beginning of your doing business, to the present with each firm. Or if you manufacture posters or any other form of DESIDERATA yourselves, you are to furnish us with the number sold and the list price of each." (PX-7)

The return receipt for Bell's certified mail #364126 was returned to Bell evidencing delivery of that letter on September 30, 1970, in Kent, Ohio, to one Gary S-----, a person identified during the trial by M. Trikilis as an employee of Pro Arts (PX-7).

21. During the period subsequent to plaintiff Bell's reception of the above-described return receipt (#364126) and June 26, 1971, when this action was filed, defendants, although repeatedly requested to do so, both by Bell and counsel for Bell, failed to supply requested information as to the sources, quantities and prices of DESIDERATA items obtained by Pro Arts from others, despite repeated statements that such information would be supplied. As indicated in Finding 24, defendants did, ultimately, identify Audio Visual Design of Clinton, Massachusetts, to Bell as one of the Pro Arts sources of DESIDERATA posters, without, however, supplying the specifically requested information as to the quantities, dates and prices of such acquisitions and a sample of an Audio Visual Design DESIDERATA poster.

22. More specifically, Bell, having received no response from Pro Arts to his certified letter of September 25, 1970, on October 7, 1970, forwarded another letter to Pro Arts Company (PX-11) at the same address in Kent, Ohio, demanding a response to the certified mail of September 25, 1970, and further demanding ". . . a clear and unequivocal statement as

to whether or not you are now or ever have been manufacturers of DESIDERATA in any printed form." Bell enclosed with this letter a Xerox copy of certified copyright renewal registration #R127188 with respect to DESIDERATA, as obtained by Bertha K. Ehrmann, February 25, 1954 (PX-2B).

23. On October 20, 1970, having still received no response from Pro Arts to his letters of September 25 and October 7, 1970, Bell telephoned Pro Arts. The person answering the telephone identified himself as T. Trikilis and said Pro Arts had not been printing DESIDERATA and that he would get back to Bell "by the next week" in response to Bell's demands for information as to the Pro Arts sources of DESIDERATA posters.

24. On November 12, 1970, still having received no response from Pro Arts to his previous letters and telephone call, Bell again telephoned Pro Arts. The person answering again identified himself as Ted Trikilis and said that a Pro Arts source of DESIDERATA had been Audio Visual Design in Clinton, Massachusetts; that Pro Arts was also pursuing Audio Visual with respect to copyrighted properties of Pro Arts; and that Trikilis would get back to Bell with the number of posters Pro Arts had obtained from Audio Visual.

25. On November 30, 1970, still having no written response from Pro Arts to his previous letters and telephone calls, Bell again telephoned Pro Arts. This time, M. Trikilis answered and promised to get the requested information for Bell, promptly, as to how many DESIDERATA posters had been sold by Pro Arts and their source.

26. On December 21, 1970, still having received no response from Pro Arts, Bell again submitted a written demand

to Pro Arts. This time, Bell's letter was addressed to Mike Trikilis, Pro Arts, Inc., 1040 Industrial Parkway, Medina, Ohio 44256 (PX-12). In this letter, Bell recited having called Pro Arts several times and having spoken to both M. Trikilis and T. Trikilis; and further stated that both of them had failed ". . . in every promise you have made to send me information relative to sales of DESIDERATA and to send me a poster manufactured by Audio Visual in Clinton, Massachusetts." Bell's letter demand of December 21, 1970, further stated:

"As you know, whether you manufacture or distribute, you are legally responsible for infringement. I have agreed that we will not pursue your firm further provided that we receive a SIGNED NOTARIZED statement as to the number of posters purchased or exchanged with other companies, as well as a statement that you did not manufacture DESIDERATA."

Bell also advised Pro Arts that legal action would follow if the requested affidavit was not promptly received.

27. Thereafter, still having received no written response from Pro Arts, Bell referred the matter to counsel in Cleveland. Counsel for Bell then, through a series of telephone calls and correspondence, first with M. Trikilis and later with former counsel for Pro Arts (PX-13 to 13F, inclusive) continued, unsuccessfully, to encourage M. Trikilis to perform his previous promises to Bell and to counsel for Bell, namely, to supply Bell with an affidavit as to the extent, duration and sources of Pro Arts' previous sales of, and dealings in, DESIDERATA items. All such efforts failed. On request, former Pro Arts counsel were furnished with documentation as to copyrights covering DESIDERATA and Bell's ownership of certain of such rights, including copies of copyright renewal registration #K12/188 of February 25, 1954,

with respect to DESIDERATA as a single literary property (PX-2A); the assignment of September 30, 1968, transferring to Bell, among other things, all right, title and interest to the titles, copyrights, plates and inventory of the book The Poems of Max Ehrmann (including DESIDERATA) and other literary works (PX-3E); and an excerpt from Together magazine of June, 1966, explaining the "Found in 1692" myth with respect to DESIDERATA (PX-14) and an offer to supply additional documentation, if requested (see April 19, 1971, letter of Bell's counsel [PX-13F]).

28. The instant action was thereafter filed June 26, 1971, in the absence of any response from Pro Arts or its former counsel as to the repeated requests for information made by or on behalf of Bell during the nine-month period from September 25, 1970, through June 25, 1971 (see plaintiffs' exhibits 11 through 13F, inclusive).

29. Pursuant to a January 25, 1972, pretrial order of Contie, J., Pro Arts supplied an affidavit dated February 15, 1972, admitting that Pro Arts had ". . . purchased and/or sold or distributed. . . approximately three thousand one hundred and ninety-six (3,196) [posters]. . . incorporating therein a poem entitled 'DESIDERATA'. . ." and that:

"Affiant says that the reason he is unable to determine the exact amount purchased and/or sold is due to the fact that said [DESIDERATA] posters were purchased from numerous parties including truck jobbers who would arrive at Pro Arts premises at non-scheduled times and trade and/or sell or purchase posters.

"Affiant says further that one of the companies that Pro Arts did purchase these [DESIDERATA] posters from was Audio-Visual Design, Post Office Box 354, Clinton, Massachusetts 01510; that the exact amount of the posters purchased from Audio-Visual Design affiant is unable to determine."
(PX-22)

30. One Hundred Twenty Seven (127) Pro Arts invoices (PX-18) show sales by Pro Arts to approximately 90 poster outlets throughout the United States, of at least 1,681 DESIDERATA items (either No. OC37 DESIDERATA or No. OC38 DESIDERATA (picture) or both) during the period from May 1970 through June 1971. M. Trikilis also admitted at the trial that Pro Arts had sold an additional 1600 DESIDERATA items of the picture-poster type under two invoices (PX-23 Pro Arts invoice evidencing sale of 1000 No. OC 38 DESIDERATA (picture) items on January 27, 1971; and PX-24 Pro Arts invoice evidencing sale of 600 No. OC38 DESIDERATA (picture) items on April 21, 1971).

31. Pro Arts invoices show that Pro Arts sold in excess of 2000 DESIDERATA items after receiving written notice under plaintiff Bell's certified mail (#364126) on September 30, 1970, followed by later continuing demands from plaintiff Bell and counsel for Bell for Pro Arts to cease and desist dealing in DESIDERATA items not bearing proper copyright notice.

32. In his deposition, taken in January 1973, more than two years after Bell's written notice of September 25, 1970, to cease and desist, M. Trikilis admitted that in addition to Audio Visual Design of Clinton, Massachusetts, Pro Arts, Inc., may have obtained copies of DESIDERATA items from Specialty Imports in Tennessee; Hip Products in Chicago; Saladin Products in California; and San Francisco Poster Company in various locations. However, in his testimony at the trial, M. Trikilis repeatedly stated he did not know how many such DESIDERATA items Pro Arts may have purchased or traded for with such sources of supply and other unidentified

sources of supply, which he knew of, but which he could not identify as to name, location, date, quantities, or prices or values at which Pro Arts had purchased or traded for such DESIDERATA items.

33. M. Trikilis further testified that although he had previously failed, during his deposition, to remember same he "just remembered" on the morning of the trial that Pro Arts had made several purchases, at unspecified times and on unspecified terms, of DESIDERATA items "in the hundreds each time" from an organization he then identified as Steffen & Gaines in Sausalito, California. Neither M. Trikilis nor T. Trikilis, although requested to do so, could produce any records, other than the invoices referred to in Finding 30, as to the amounts, dates, times, places, quantities, prices, and sources of DESIDERATA items purchased or traded for by Pro Arts. Although Pro Arts admitted printing its own 1970 catalog (PX-21) and its own advertising flyer (PX-20), each of which contained one or more reproductions of DESIDERATA, Pro Arts denied it had ever printed or produced any DESIDERATA items, utilizing its own production facilities.

34. Pro Arts admitted its 127 invoices, which evidenced sales of DESIDERATA items (PX-18), showed that the orders for such sales were obtained by or credited to 13 different salesmen, including T. Trikilis. Pro Arts further admitted that at no time were any Pro Arts' salesmen given instructions to cease and desist selling or otherwise dealing in DESIDERATA items.

35. M. Trikilis admitted that he gave the following testimony in his deposition:

Q. When you sold DESIDERATA, you always sold them under the OC37 stock number?

A. Not necessarily. I believe we had variations. The poster came in three or four different ways.

Q. The DESIDERATA poster came in three or four different ways?

A. Correct.

Q. All right. What other different ways?

A. One was on parchment.

Q. Okay.

A. One was just on paper.

Q. Yes.

A. One was with a picture of a lake or something like that. And I think one was on a scroll. There may be even more variations, but we didn't list them all. We just put down one. Whatever we happened to have at the time was what we probably shipped.

36. The evidence has shown that the poster making, selling, distributing and trading business, in effect, is a rough and tumble business, participated in by many transient operators, some of whom Pro Arts dealt and traded with, without even knowing their names. In effect, some poster makers, traders, and distributors were seen once, and then never seen again. Others were more established. In effect, record keeping in the poster exchange and trading business is informal and sometimes non-existent, as when quantities of posters at one value are traded for lesser or greater quantities of posters at a different value.

E. Damages

37. Pro Arts did not submit evidence of its costs with respect to its acquisition of DESIDERATA items for sale to, or exchange with, others.

38. Plaintiffs' actual damages are not readily ascertainable because (1) Pro Arts did not know how many DESIDERATA items it had sold or exchanged in total. Hence, Bell had no means of establishing his loss of royalties occasioned by sales and exchanges of DESIDERATA items by Pro Arts as an unlicensed seller, or his further losses arising from being deprived of an undisclosed number of opportunities to sell his own renditions of DESIDERATA as manufactured and offered for sale by Crescendo Publishing Company (See PX-1); and (2) by selling DESIDERATA items in the form advertised and shown by Pro Arts as No. OC37--bearing the words, "Found in Old Saint Paul's Church; dated 1692," Pro Arts aided in the perpetuation of the myth that DESIDERATA was in the public domain, due to alleged ancient origins; and (3) by selling DESIDERATA items in the form shown by Pro Arts as No. OC38, depicting a placid beach or water scene with the full text of DESIDERATA shown below--whether such posters carried the notation "© 1968 American Newsrepeat Co., 243 Collins St., San Francisco, California 94118," or not--Pro Arts aided in the perpetuation of other myths, i.e., that DESIDERATA had been copyrighted by American Newsrepeat Company or that DESIDERATA itself is not copyrighted.

F. Plaintiffs' Efforts to Police its Copyright Rights Relative to DESIDERATA

39. As of March 5, 1973, Bell had, in addition to the present action, instituted four other lawsuits charging many others with infringements of DESIDERATA; licensed six prior infringers upon payment of royalties for past infringements; settled with five infringers who had paid damages; and had licensed ten other organizations to utilize DESIDERATA in variously defined ways and forms.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter, under 28 USCA §1338, and of the parties.

2. The economic philosophy behind the power of Congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare in that field. Mazer v. Stein, 347 US 201, 219 (1954).

3. Under the U. S. Copyright Act, any copy of a copyrighted article ". . . made or sold or found in the possession of the infringer. . . ." after notice, is a separate infringement (17 USC §101). With respect to infringements occurring before or without notice, innocence of intention to infringe is no defense. See Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., Inc., 316 F.2d 304, 308 (2d Cir. 1963).

4. This copyright action would not have been necessary, but for the repeated failures of defendants to supply Bell, as copyright proprietor of DESIDERATA, with facts, figures, and samples of the infringing DESIDERATA posters. Although such information was repeatedly promised by defendants, they, for whatever reason, failed to supply it to Bell and thereby deprived Bell of the data he needed, properly to protect and defend his copyright rights to DESIDERATA.

5. Defendants M. Trikilis and T. Trikilis are, respectively, the president and vice president of Pro Arts. They are, between them, the owners of 80% of the stock of that fast-growing company, whose estimated gross revenues have

risen from approximately \$350,000. in 1969 to approximately \$1,200,000. in 1973. Both of them have been actively engaged in the general operation of Pro Arts since its inception. Nevertheless, both these defendants repeatedly testified, "I don't know," or the equivalent, with respect to relevant matters such as, but not limited to, the total number, the prices and the sources of infringing DESIDERATA posters which Pro Arts had admittedly purchased or traded for, both before and after actual notice of plaintiff Bell's copyright rights with respect to DESIDERATA. On the record made in this case, such matters were, or should have been, peculiarly within the knowledge of such defendants. This Court has, therefore, taken into account, in the formulation of its Conclusions of Law, that through no fault of Bell and through no lack of diligent inquiry by him, both before and during the trial, these defendants have, for whatever reason, impeded plaintiffs from obtaining prompt and accurate information as to the infringing activities of Pro Arts and others.

6. Defendants, in explanation of their collective lack of records as to their purchases and trades made to obtain infringing DESIDERATA posters and their failure to supply plaintiffs with samples of same, described the poster-youth novelty business in which they were engaged, in effect, as a "rough and tumble" business, subject to informal operating procedures.

The law does not countenance such circumstances or explanations as somehow excusing disregard of the property rights of others. Cf. City Loan and Savings Co. v. Employers' Liability Assurance Corp., 249 F.Supp. 633, 657 (N.D.Ohio 1964); aff'd., 356 F.2d 941 (6th Cir. 1966).

7. Plaintiff Bell is now the proprietor of residual author's copyright rights to DESIDERATA as found in Findings 5, 11 and 13. Plaintiff Cuarta is now the proprietor of residual publishing copyright rights to the book entitled, The Poems of Max Ehrmann (including DESIDERATA), as found in Findings 9, 11, 14 and 15.

8. On September 25, 1970, when plaintiff Bell directed a letter by certified mail (#364126) to Pro Arts in Kent, Ohio, demanding that Pro Arts cease and desist utilizing DESIDERATA and further demanding information as to the source and quantity of DESIDERATA items then maintained by Pro Arts, plaintiff Bell had the right and duty to proceed as he did.

9. The evidence is conclusive that on September 25, 1970, plaintiff Bell mailed, by certified mail, a cease and desist demand to Pro Arts. The requested return receipt for that letter (#364126), moreover, demonstrates that the letter had been delivered to an admitted employee of Pro Arts at Kent, Ohio (P. O. Box 287) on September 30, 1970 (PX-7).

Defendants M. Trikilis and T. Trikilis, however, deny that plaintiff Bell's letter demand of September 25, 1970 was seen by them or brought to their attention. This dispute raises a question of agency. Whether the authority of the party who signed the return receipt (#364126) on behalf of Pro Arts, in Kent, Ohio, on September 30, 1970, was express, implied or apparent, the result is the same. Since the party who signed the receipt was an employee of Pro Arts, it follows that whether that employee did or did not bring the certified letter to the attention of the president or vice president of Pro Arts, plaintiff Bell had done all he could do to notify Pro Arts; and the fault, if fault there was in bringing the

letter to the attention of the officers of Pro Arts, is the fault of Pro Arts for which Pro Arts, and not Bell, is responsible. 2 Ohio Jur. 2d, Agency §91. Otherwise, the anomalous and unacceptable situation would arise whereunder any corporate addressee could avoid the effect of the receipt of certified mail merely by denying, not that the letter was delivered to the corporation, but rather by denying only that the letter was brought to the attention of an appropriate representative of the corporation. The Court concludes, therefore, that Pro Arts did receive written notice to cease and desist utilizing DESIDERATA in any unauthorized manner on September 30, 1970. In addition, the evidence is undisputed that Pro Arts, at or about the time of receipt of Bell's letter of December 21, 1970 (PX-12), had ample notice of Bell's rights with respect to DESIDERATA.

10. The evidence as to continued infringements of DESIDERATA by defendants, after notice, is clear with respect to the sale of more than 2000 DESIDERATA posters by Pro Arts, as shown by copies of its invoices which are in evidence. What is not clear in the evidence is the total number of DESIDERATA articles that were sold, purchased, or traded for by defendants, both before and after written notice from plaintiff Bell.

11. The Court concludes that plaintiffs' damages are not readily ascertainable. This is so, regardless of the actual number of DESIDERATA articles sold by defendants, over and above the more than 2000 copies sold after notice. It is clear that each of the DESIDERATA items sold and/or traded for by defendants, both before and after notice, damaged Bell in at least one of the following three ways:

- (A) Posters bearing the mythical notation,
"Found in Old Saint Paul's Church;
Dated 1692" perpetuated the myth
that DESIDERATA was in the public
domain and was not copyrighted.
- (B) Beach scene posters containing the full
text of DESIDERATA and bearing a mis-
leading indication of non-applicable
copyright by American Newsrepeat Co.
of San Francisco stated or perpetuated
a different myth that American Newsrepeat
Co., and not plaintiffs, was the pro-
prietor of a copyright to DESIDERATA.
- (C) Beach scene posters containing the full
text of DESIDERATA, but having no bottom
margin (as shown in item No. OC38 in the
1970 Pro Arts catalog) and therefor
showing no notice of copyright whatsoever,
denied plaintiffs' copyright rights by
inferring no such copyright rights existed.

12. 17 USCA §101 provides, in effect, that where actual damages to the copyright proprietor and/or profits accruing to the infringer, as a result of infringing conduct, are not ascertainable with accuracy or precision, as here, the trial court has discretionary authority to award damages in lieu of actual damages up to and including \$5000.

It has long been the rule in this District, as decided in Sebring Pottery Co. v. Steubenville Pottery Co., 9 F.Supp. 384 (N.D. Ohio 1934), that with respect to such

statutory "in lieu" damages:

" . . . where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge." (9 F.Supp. at 389)

13. In view of the circumstances disclosed by the testimony and by the exhibits, the Court finds defendants Pro Arts, Inc., Michael P. Trikilis and Theodore N. Trikilis to be jointly and severally liable as infringers of the valid copyrights of plaintiffs. The Court awards to plaintiffs damages in lieu of actual damages in the amount of Five Thousand Dollars (\$5,000.).

14. Under appropriate circumstances, punitive or exemplary damages may be awarded in copyright actions. See e.g., Nash v. Alaska Airlines, Inc., 94 F. Supp. 428 (S.D. N.Y. 1950). This Court cannot say the circumstances of this case necessitate or require the imposition of punitive damages. Accordingly, no such damages are awarded.

15. 17 USC §116 authorizes the allowance of full costs and attorneys' fees to the prevailing party in a copyright action. Full costs and reasonable attorneys' fees should be awarded to plaintiffs.

ORDER

Accordingly, it is hereby ordered and adjudged that:

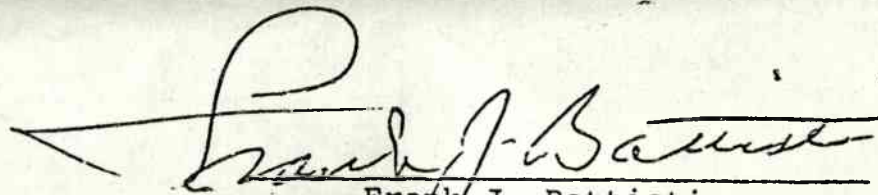
(1) Pro Arts, Inc., Michael P. Trikilis and Theodore N. Trikilis, alone or through agents, distributors, and all others in privity with them, are permanently enjoined from further infringing copyrights #R127188 and #A28266 by dealing in, copying, printing, selling, possessing or otherwise making any further use of DESIDERATA or any of the other

literary works of Max Ehrmann covered by the aforementioned copyrights, without the express written permission of the copyright owners.

(2) Plaintiffs recover of defendants Pro Arts, Inc., Michael P. Trikilis and Theodore N. Trikilis jointly or severally the sum of Five Thousand Dollars (\$5000.).

(3) Plaintiffs are awarded full costs and reasonable attorney's fees. Determination of such attorney's fees are deferred until submission by plaintiffs' attorney of an affidavit setting forth the time and effort allotted to this case together with a reasonable hourly rate. Defendants may file specific objections to the attorney's fees requested by plaintiffs' attorney in his affidavit.

IT IS SO ORDERED.


Frank J. Battisti
Chief Judge

Bell v. Combined Registry Co., 536 F.2d 164 (7th Cir., 1976)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1753

1976.C07.40492 <<http://www.versuslaw.com>>; 536 F.2d 164

decided: May 14, 1976.

ROBERT L. BELL, D/B/A CRESCENDO PUBLISHING COMPANY, PLAINTIFF-APPELLANT,

v.

COMBINED REGISTRY COMPANY, AN ILLINOIS CORPORATION, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 72 C 1819 JOEL M. FLAUM, Judge.

Fairchild, Chief Judge, Cummings and Pell, Circuit Judges.

FAIRCHILD, Chief Judge.

Appellant Robert L. Bell, as proprietor of the federal copyright in a prose piece entitled Desiderata, brought an action in the district court and alleged copyright infringement by the appellee Combined Registry Company in its unauthorized publication of Desiderata in its August, 1971 issue of Success Unlimited magazine. The district court held that appellee successfully asserted defenses of forfeiture and abandonment of the copyright.

For the reasons stated herein, we affirm.

I

Statement of Facts

The facts in this matter are fully set forth in the district court's opinion,*fn1 and are only summarized here.

Hoosier poet Max Ehrmann is the undisputed author of the prose poem Desiderata. In 1927, he obtained a federal copyright in the work. At Christmas time of 1933, Ehrmann sent out Christmas cards including the text of Desiderata. The record contains no copy, nor other evidence to show whether a copyright notice appeared thereon.

The next episode concerning Desiderata, and the one upon which the district court based its finding of forfeiture, is related in the correspondence between Ehrmann and one Merrill Moore, a United States Army psychiatrist during World War II. Moore first wrote to Ehrmann in 1942 from Denver and indicated that he had distributed an estimated 1,000 copies of Desiderata over the years while in civilian practice in Boston. Their letters reveal that Moore requested and received permission from Ehrmann to distribute Desiderata to the soldiers as part of his treatment. In November of 1944, Moore twice wrote to Ehrmann from the South Pacific and stated that he continued to use the prose poem in his work.

Ehrmann died September 9, 1945. In late 1945, reports of the Ehrmann-Moore correspondence appeared in several publications, each of which set out Desiderata without copyright notice. Additionally, a copy of the poem bearing no copyright notice was found in Moore's papers in his Library of Congress file.

In 1957, one Reverend Kates included a copy of Desiderata without copyright notice, in his book, *Between Dawn and Dark*. It was not until 1972 that his publisher notified him that Desiderata was under copyright. Reverend Kates also deposed that over the years he had distributed a substantial number of copies of Desiderata to his parishioners, and specifically recalled dispensing about 200 copies at a Lenten Service in 1959 or 1960 while he was at St. Paul's Church in Baltimore, Maryland. During the 1960's and early 1970's, a great number of periodicals printed Desiderata, and many firms distributed wall posters of the work, with the erroneous attribution "Found in Old St. Paul's Church, Baltimore, Dated 1692." Reverend Kates' use of Desiderata is the apparent source of this widespread erroneous attribution of the work to St. Paul's Church, which was founded in 1692.

II

Use of New Rules of Evidence

Appellant Bell's first assignment of error concerns the propriety of the district court's use of the new Federal Rules of Evidence (hereinafter "Rules") which became effective July 1, 1975.*fn2 The appellant questions the use of the new Rules in the context of the district court's admission of fifteen documents for their truth under new Rule 803(16).*fn3 That rule pertains to the admission of ancient documents and excerpts from the operation of the hearsay rule, "statements in a document in existence twenty years or more the authenticity of which is established." Most of the documents to which appellant objects are the letters comprising the Max Ehrmann-Merrill Moore correspondence during World War II and some periodicals reporting that correspondence.*fn4

Preliminarily, we note that this matter did not proceed as a conventional trial. On November 12, 1974, the parties entered into a stipulation as to the authenticity of the various exhibits, including those challenged here. By January of 1975, the parties had submitted their documentary evidence as well as three sets of briefs for the district court's consideration. The record reveals that oral arguments regarding the stipulations and briefs were scheduled for May 20, 1975 before District Judge Flaum. However, as appellant has failed to supply this court with a transcript of that proceeding, we must look to the briefs and stipulations of the parties for any evidentiary objections.

It is appellant's contention that the district court erred in applying the new Rules in that both parties had submitted their evidentiary materials, briefs and stipulations by January of 1975, well in advance of the effective date of the new Rules. Appellee contends that appellant has waived any objection to the use of these Rules by failing to make an objection below. We agree.

Nowhere in the record does it appear that appellant objected to these documents as inadmissible hearsay. While it is true that the parties entered into a stipulation regarding the authenticity of these documents, and thereby effectively reserved objections on other grounds, nowhere does it appear that appellant in fact interposed an objection to consideration of these documents for any purpose.

Even if appellant had properly preserved his objection, we would not feel compelled to find that the district court's use of the new Federal Rules of Evidence constituted error. Since 1971, this court has urged that the proposed rules "be used by the district courts as guidelines and at least given consideration in the exercise of their discretion in making evidentiary rulings." *United States v. McCarthy*, 445 F.2d 587, 591 (7th Cir. 1971), recently cited with approval by this court in *United States*

v. Senak, 527 F.2d 129 (7th Cir. 1975), cert. denied, 425 U.S. 907, 96 S. Ct. 1500, 47 L. Ed. 2d 758 (1976) and in *United States v. Craig*, 528 F.2d 773 (7th Cir. 1976).

Additionally, we note that the enacting clause of the new Federal Rules of Evidence states:

The following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

The new Rules were in effect on July 16, 1975, the date of the district court's entry of judgment for defendant-appellee; thus, the case was pending within the meaning of the enacting clause. The use of the new Rule certainly was feasible particularly in the context of the informal format of the proceedings below, and we fail to see what injustice would inure to the appellant. Appellant claims that he had no notice of the use of the new Rule and argues that under former Rule 43(a) of the Federal Rules of Civil Procedure, the court was obligated to exclude evidence excludable under Illinois law. There is support for appellant's position that under Illinois law the 30-year ancient documents rule cannot be invoked "except to relieve a party from the burden, otherwise imposed, of proving the due execution of the instrument," that is, solely for purposes of authenticating ancient documents. *Koch v. Streuter*, 232 Ill. 594, 603, 83 N.E. 1072 (1908). Even so, we note that Rule 43(a), F.R.Civ.P., before it was amended to reflect the new Rules of Evidence, stated that the rule favoring reception of evidence governs. It has been held that federal courts are not bound by a state exclusionary rule. *International U., U. Brewery, etc., Wks. v. Duke & Co., Inc.*, 373 F. Supp. 778 (W.D.Pa. 1974), *aff'd* without opinion, 510 F.2d 969 (3rd Cir. 1975) and *Baylor v. Mading-Dugan Drug Company*, 57 F.R.D. 509 (N.D. Ill. 1972).

III

Forfeiture of the Copyright

Appellant's main substantive attack is upon the district court's findings that Ehrmann's actions regarding *Desiderata* resulted in both forfeiture and abandonment of his copyright protection in the work. We deal first with appellant's dispute with the finding of forfeiture.

The Copyright Act requires copyright notice on material sought to be protected. 17 U.S.C. § 10. The district court correctly stated the elements of forfeiture as a general publication authorized by the copyright proprietor without the correct notice appearing thereon. *Nimmer on Copyrights*, Section 82.

The district court cited the Ehrmann-Moore correspondence as one instance of the copyright proprietor's use of *Desiderata* supporting forfeiture of copyright protection. In our view, the Ehrmann-Moore correspondence represents the only such instance in the record capable of supporting a finding of forfeiture. The 1933 Christmas cards were not a general publication capable of divesting copyright in the work. And, neither the publications of *Desiderata* by Reverend Kates nor those that appeared in various periodicals were shown to have been authorized by the copyright proprietor.

The correspondence between Ehrmann and Moore does supply direct credible evidence of a general publication authorized by the copyright proprietor. In fact, the evidence reveals two authorized distributions of *Desiderata* by Moore: one in Denver in 1942, as revealed by Moore's November 3, 1942 letter to Ehrmann; the other in the South Pacific, as confirmed by Moore's letters of November, 1944.

While it is true that there is no direct evidence to establish that those copies distributed by Moore to soldiers bore no copyright notice, we think that the evidence viewed as a whole supports such an inference. The district court reported that the following considerations comprised the factual underpinnings for the inference that Moore distributed copies of Desiderata without the requisite copyright notice:

The ambience of the exchange of letters between the two men was one of informality and cordiality. Permission to use the work was given gratuitously. Nowhere was a copyright or copyright notice mentioned. The lone copy of the poem found in the Merrill Moore papers did not have such a notice. Nor did the copy that Reverend Kates found some years later. 397 F. Supp. 1241 at 1248.

The inference of no notice appearing on the copies distributed by Moore is a fair one; we cannot say that such a finding is clearly erroneous.

A. 17 U.S.C., Section 8

Appellant has belatedly raised on appeal the alternative argument that even if no copyright notice appeared on the copies distributed by Moore, no forfeiture occurred because that distribution by Moore was a publication by the Government. Appellant relies on the second paragraph of Section 8, Title 17, U.S.C., which reads:

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

Diligent research has produced only two cases alluding to the second paragraph of 17 U.S.C., Section 8. Neither of those cases presented an issue of whether the publication was "by the Government." In *Time, Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968), the publication "by the Government" was the Warren Report, the product of a special commission appointed by President Johnson to investigate the killing of President Kennedy. The Warren Report was printed by the Government Printing Office and offered for sale to the public. The copyrighted material involved was Abraham Zapruder's film of the assassination, evidence which was essential to the task of the commission. A member of the commission described the film as "one of the most important pieces of evidence to come before the . . . Commission." *Time, Incorporated*, supra, p. 134.

In *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970), the alleged publications "by the Government" were the publicly accessible transcripts and opinions in the criminal prosecutions brought against comedian Lenny Bruce. There can be no question that those publications were "by the Government."

Public Affairs Associates, Inc. v. Rickover, 109 U.S. App. D.C. 128, 284 F.2d 262 (D.C. Cir. 1960), vacated on other grounds, 369 U.S. 111, 82 S. Ct. 580, 7 L. Ed. 2d 604 (1962), on remand, 268 F. Supp. 444 (D.D.C. 1967) is entitled to some consideration here in deciding what constitutes a publication "by the Government." While it is true that Rickover was concerned with the first rather than the second paragraph of Section 8, Title 17, similar considerations were at play. One of the preliminary questions to be decided was whether certain speeches delivered by Admiral Rickover were "publications of the United States Government" and therefore not copyrightable under the first paragraph of 17 U.S.C., Section 8.^{*fn5} The Court of Appeals in Rickover stated at 284 F.2d 262, 268, with regard to 17 U.S.C., Section 8:

The copyright provision should be read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. These would be authorized expositions on matters of governmental interest by governmental authority.

On remand, the district court examined the circumstances of the preparation and delivery of the speeches and the speeches themselves, and determined that the speeches were not written or delivered as a part of the Admiral's official duties. Rickover, *supra*, 268 F. Supp. 444 (1967). The court noted at page 449 that the only connection with the United States Government was in the purely mechanical operation of typing a final draft for duplication on Navy facilities.

We do not think that the instant case falls within the ambit of 17 U.S.C., Section 8. It is true that Major Moore was for some purposes an agent of the United States in his capacity as psychiatrist in the United States Army. However, we think that Major Moore's distribution of Desiderata to soldiers lacks the requisite degree of governmental association or interest necessary to constitute a publication "by the Government" within the meaning of 17 U.S.C., Section 8.

Clearly, Moore was not directed or specifically authorized by Army superiors to distribute Desiderata to the soldiers; distribution was his own idea. At most, he continued, while treating soldiers on behalf of the government, an incident of treatment which he had found desirable in civilian practice. Presumably government personnel may have used government equipment in multigraphing the material. The district court in Rickover, *supra*, was not persuaded that the typing of a final draft of one of Rickover's speeches and duplication on Navy facilities was sufficient governmental association to defeat his copyright in the speech. Nor are we so persuaded in this case. Furthermore, although Major Moore distributed Desiderata in order to help his Army patients with their attitudes, such use was not merely comparable in its significance, to the governmental interest in the use of material in *Time, Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968), where the presidentially convened Warren Commission valued the Zapruder film of the Kennedy assassination as one of the most important pieces of evidence before the Commission. To hold that Moore's distribution of Desiderata was a publication "by the Government" would result in a strained construction of 17 U.S.C., Section 8.

B. 17 U.S.C., Section 10

Appellant has also argued that the finding of forfeiture should be set aside because in its view, Section 10 of the Copyright Act indicates that publication within the United States is an element necessary to a finding of forfeiture. Section 10 reads:

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books, seeking ad interim protection under section 22 of this title.

Appellant argues that since the improper publication, Moore's distribution of Desiderata, occurred overseas, there can be no forfeiture.

We doubt that this section has any such effect, but do not find it necessary to interpret Section 10 on these facts. Clearly, there is ample room in the evidence to infer an authorized distribution of Desiderata by Moore while he was still in Denver, Colorado. On October 5, 1942, Moore wrote Ehrmann from Denver, ". . . I have distributed the beautiful copies which you sent me and want to thank you for them again. . . ."

IV

Abandonment of the Copyright

As set forth in the district court's decision, the conclusion of abandonment rests upon a finding of Mr. Ehrmann's long-term intent to contribute Desiderata to the public. The reasonableness of the inferences necessary to be drawn in order to reach that finding is probably less clear than the reasonableness of those supporting a finding of forfeiture by reason of the Moore publications. We do not, however, decide the propriety of the abandonment holding because the finding of forfeiture disposes of the case.

The judgment appealed from is AFFIRMED.

Disposition

The judgment appealed from is AFFIRMED.

Opinion Footnotes

[1] Bell v. Combined Registry Company, 397 F. Supp. 1241 (N.D. Ill. 1975).

[2] Public Law 93-585, 93rd Congress.

[3] Insofar as the letters are used to show Ehrmann's consent to Moore's use of Desiderata, the letters are not admitted for the truth of the matter stated therein and therefore are not objectionable as hearsay evidence. However, to the extent the letters and other documents are used to prove the fact of distribution of copies of Desiderata, and to support the inference that they bore no notice, the letters are potentially excludable as hearsay, unless they fall within an exception to the rule against hearsay.

[4] Appellant objects to the admission of the following documents:

1. Letter, dated July 20, 1942, from Moore to Ehrmann. 2. Letter, dated August 17, 1942, from Fuller to Moore. 3. Letter, dated October 5, 1942, from Moore to Ehrmann. 4. Envelope postmarked October 6, 1942, and addressed to Ehrmann from Moore. 5. Letter, dated November 3, 1942, from Ehrmann to Moore. 6. Letter, dated November, 1944, from Moore to Ehrmann. 7. Letter, dated Thanksgiving, 1944, from Moore to Ehrmann. 8. Envelope

postmarked January 26, 1945, addressed to Indiana Publishing Company, with return address of 51 Northwest First Street, Miami 32, Florida. 9. Publication of A.A.A.S. Bulletin, Vol. 4, October, 1945, No. 10. 10. Article entitled "Nationally Known Poet and Author Dies" from DePauw Alumnus, Vol. X, November 1945, No. 2. 11. Article entitled "A Poet's Influence" from Saturday Spectator, dated December 15, 1945. 12. Letter, dated January 13, 1934, from Worth M. Tippey to Ehrmann. 13. Letter, dated January 10, 1934, from Halsted L. Ritter to Ehrmann. 14. Letter, dated December 21, 1973, to Mr. Goldstein from Roy P. Basler. 15. Copy of Desiderata reproduced from the collections of the manuscript division, Library of Congress.

[5] The relevant portion of 17 U.S.C., Section 8 first paragraph reads: No copyright shall subsist . . . in any publication of the United States Government, or any reprint in whole or in part thereof. . . .

The full text of "Desiderata" is available here.

Official Cite:

Bell v. Combined Registry Co., 536 F.2d 164 (7th Cir. 5/14/1976), cert. denied 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d. 612 (December 6, 1976).

Comments and suggestions are invited.

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U.S. Court Of Appeals Affirms 'Desiderata' Copyright Valid

8 MAR 23 1975
By JOE BOLAND
Star Staff Writer

Community
1969 following almost four years
of controversy.

A continuing effort to have the renowned philosophical statement "Desiderata" properly attributed to Terre Haute author Max Ehrmann now has the weight of the U.S. Court of Appeals behind it.

A three-judge panel for the Sixth District appellate court recently affirmed a U.S. District Court decision that found Crescendo Publishing Co. holds a valid copyright for the work and that the copyright was infringed in several respects by Pro Arts, Inc.

Robert L. Bell, president of Crescendo, a Boston music publisher, acquired the copyright to "Desiderata" and other Ehrmann works from a nephew of Bertha Pratt King, Ehrmann's widow of the Terre Haute poet, philosopher, lawyer and playwright.

+ + +

Ehrmann was identified as the author of "Desiderata" in

In 1965, after the death of Adlai Stevenson, "Desiderata" was reproduced widely when it was discovered Stevenson had planned to use the philosophical essay on his Christmas greeting cards that year.

The credit line, however, read: "Found in Old St. Paul's Church, Baltimore. Dated 1692."

Publishers had assumed the inspirational piece was in the public domain and outside copyright; and so did Fred Werner, the musician and composer who produced recording of "Desiderata" in 1971 which rapidly rose to the tops of the music charts and which has

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Ehrmann

Continued From Page 1
since been translated into at least five languages.

It was then that Bell decided to make certain that Ehrmann be established as the undisputed author of the work.

+ + +

The story of the voyage of "Desiderata" during the last several years and the efforts to trace it are involved, but the end result is that somewhere along the line, "Desiderata" was indeed found in Old St. Paul's Church, Baltimore.

In 1955, the rector of the Baltimore Anglican church, the Rev. Frederick Kates, mimeographed for his congregation a copy of Ehrmann's work and fully credited the author. The work was reproduced on church stationery which bore the letterhead, "Old St. Paul's Church. Founded in 1692."

It can be assumed a parishoner or tourist picked up a copy of the work—which had been left by the Rev. Mr. Kates in the pews—and stuck it in his pocket or tucked it away for future reference. Eventually it found its way into the hands of a publisher who recognized the financial possibilities in printing the work.

For a two-year period, Bell spent much time locating publishers who had distributed the work in various forms and notifying them that "Desiderata" is indeed copyrighted.

In July 1973, documents were discovered in the U.S. Library of Congress which show that Ehrmann submitted a copyright application and author's affidavit to the register of copyrights at Washington, D.C., to obtain exclusive rights to "Desiderata."

On the affidavit which was submitted in Ehrmann's handwriting Jan. 4, 1927, he identifies the work as a "prose wall card" which begins "Go placidly . . ." Ehrmann states on both the affidavit and copyright application that the work has no title.

"Desiderata," which is Latin meaning, literally, things to be desired, was appended to the statement at a much later date. In his journal and other writings, Ehrmann always referred to the work as "Desid."

Ehrmann died in 1945 some six months following his marriage to Bertha Pratt King who operated King Classical School for young women at Sixth and Farrington streets.

+ + +

Mrs. Ehrmann died in January 1962 following an eight-year illness.

A three-day observance of the 100th anniversary of Ehrmann's birth was sponsored here in September 1972 by the Terre Haute Area Chamber of Commerce and Vigo County Public Library.

An informal group which comprises persons who knew Ehrmann and those who were involved in the planning of the centennial observance has gathered each year since 1972 to mark Ehrmann's birthday anniversary Sept. 26. The group calls itself Friends of Max Ehrmann.



X

Max Ehrmann.



Cuarta Corporation
d.b.a.

Crescendo Publishing Co.

617-482-2420

48-50 MELROSE STREET
BOSTON, MASS., U.S.A. 02116

ANNOUNCEMENT

Effective December 1, 1976 Crescendo Publishing Co., 48-50 Melrose St., Boston, Mass. 02116 has sold all of its music books, including inventory, copyrights, contracts and trade name to Pentalic Corporation, 132 W. 22nd St., New York, New York 10011, who will continue the Crescendo name at that address. All orders, queries, and manuscripts should be sent there (tel. 212-989-4664). Pentalic publishes books dealing with the graphic arts.

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DESIDERATA

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